

FILED
COURT OF CRIMINAL APPEALS
10/8/2020
DEANA WILLIAMSON, CLERK

PD-0724-20 and PD-0725-20
In the Court of Criminal Appeals of Texas
At Austin

—◆—
Nos. 01-20-00004-CR and 01-20-00005-CR
In the Court of Appeals
For the First District of Texas
At Houston

—◆—
Nos. 1657519 and 1657521
In the 338th District Court
Of Harris County, Texas

—◆—
Ex parte Joseph Gomez
Appellant

—◆—
State's Brief on Discretionary Review
—◆—

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Statement of the Case

The appellant was arrested and charged by complaint with burglary of a habitation and assault of an individual with whom he had a dating relationship by impeding breath. (1 Supp. CR 4; 2 Supp. CR 4).¹ A hearing officer set bail at \$25,000 for the burglary and \$15,000 for the assault. (1 CR 19, 22). The appellant posted bail bonds in those amounts. (1 CR 29, 32). At his first court appearance, the district judge to whose court the case was assigned determined the amount of the bonds was insufficient, revoked those bonds, and ordered bail be set at \$75,000 for each case. (1 CR 39, 41).

The appellant filed a pretrial application for habeas corpus relief, asking the trial court to reinstate his bonds. (1 CR 8-9).² After a hearing, the trial court denied relief. (2 RR 23-24). The trial court certified the appellant's right of appeal and the appellant filed notices of appeal. (1 CR 68, 69; 2 CR 68, 69).

¹ The State will describe the clerk's records for these two cases as though they were sequential volumes. The record for No. 1657519 (the burglary case) will be 1 CR and 1 Supp. CR. The record for No. 1657521 (the assault case) will be 2 CR and 2 Supp. CR. When documents are identical in the records the State will cite 1 CR and 1 Supp. CR.

² For whatever reason, the writ application appears in the original clerk's records and then twice in the supplemental records. (*See* 1 Supp. CR 23-28, 78-84). There's also a shorter "Application for Writ of Habeas Corpus Seeking Bail Reduction," filed three days before the other application, in the supplemental records. (*See* 1 Supp. CR 15-16).

A panel of the First Court of Appeals reversed the denial of relief and “render[ed] judgment granting the writ and reinstating [the appellant’s] prior bonds.” *Ex parte Gomez*, Nos. 01-20-00004-CR and 01-20-00005-CR, 2020 WL 4577148 at *7 (Tex. App.—Houston [1st Dist.], August 7, 2020 pet. granted)(mem. op. not designated for publication). The First Court issued its mandates in the cases contemporaneous with the opinion. *Ibid.* This Court later ordered the First Court to withdraw its mandates—which the First Court did—and granted discretionary review.

Ground for Review

The First Court erred by holding that a trial court cannot find a bond “insufficient in amount” once a defendant has posted the bond. Whether the bond is “insufficient in amount” is not a question of whether the defendant made a bond equal to the bail amount, it is a question of whether the required amount should be set higher.

Statement of Facts

When police arrived at the crime scene, the complainant told officers

as she woke up, the [appellant] was crouching near her bed. He was wearing all black, wearing a black mask. When she saw him, he got on top of her and start[ed] choking her. Her sister rushed into the room, pushed him off of

her, and then he fled the residence and he was located by officers not far from the residence.

The complainant told [the responding officer] that she located inside the side room of her residence a couple of bottles of urine and some of [the appellant's] personal affects, and that led the complainant...to the reasonable conclusion that [the appellant] was lying in wait hiding in the residence for some time.

(1 RR 4).

Procedural Background

I. Initial Appearance and Habeas Application

A. The appellant made the bonds set by the hearing officer. But the trial court revoked those bonds and set bail at a higher amount.

After his arrest on charges of burglary and assault, by strangulation, of a family member, the State requested that bail be set at \$100,000 in each case. (1 CR 19, 22). The hearing officer before whom the appellant first appeared set bail at \$25,000 for the burglary charge and \$15,000 for the assault case. (1 CR 19, 22). Roughly twenty-nine hours later, before any other court appearance, the appellant obtained bail bonds for both cases. (1 Supp. CR 9-10; 2 Supp. CR 14-15).

Soon after, the appellant made his first appearance before the district judge to whose court his case had been assigned. (1 Supp. CR

146; 1 RR 4). That judge ordered the defendant rearrested and ordered him to obtain new bonds to total \$75,000 for each case. (1 Supp. CR 8; 2 Supp. CR 13).

A few days later, counsel for the appellant appeared and asked the trial court to reinstate the original bonds. (2 RR 13). The trial court denied this motion. (2 RR 13).

B. The appellant applied for habeas relief, claiming the trial court erred by revoking his original bonds. The trial court denied relief and said its actions were justified by Article 17.09 because it believed the original bonds were insufficient in amount.

The appellant applied for a writ of habeas corpus, alleging he was being held illegally because the trial court was without authority to require him to obtain another bond. (1 CR 4-9). At the writ hearing, the appellant argued that, under Code of Criminal Procedure Article 17.09, once he made bail the trial court could raise the amount of the bail only with “good and sufficient cause,” which did not exist in this case. (2 RR 18-19).

The appellant also argued he was denied due process because he did not have notice the trial court would review the amount of his bonds, and he was denied the right to counsel of his choice because the trial court had appointed a lawyer for him, even though he wanted

to retain a different lawyer. (2 RR 19-20). Finally, the appellant argued that to whatever degree the trial court relied on the prosecutor's recitation of the facts of the alleged offense as a basis to raise the appellant's bail it violated the Rules of Evidence. (2 RR 20-21).

The State responded that Article 17.09 gave the trial court the authority to rearrest a defendant and require him to post another bond anytime it determined the current bond was insufficient in amount. (2 RR 21-22). The State also argued that a trial court's decision to review the amount of bail is not a "formal hearing," thus defendants are not entitled to a lawyer. (2 RR 21-22).

The trial court denied relief. (2 RR 24). It explained it believed its action was authorized by Article 17.09, which allows a court to rearrest a defendant and require him to obtain another bond "whenever, during the course of the action, the judge ... in whose court such action is pending finds that the bond is ... insufficient in amount...." (2 RR 24); TEX. CODE. CRIM. PROC. art. 17.09 § 3. The court described the earlier proceeding as a "bail review hearing." (2 RR 24). The trial court said that at that hearing it "heard the probable cause in this [case] and deemed the original bond was insufficient." (2 RR 24).

II. In the First Court

A. The appellant argued the trial court erred by revoking his bonds without “good or sufficient cause.” The State replied that the trial court’s determination that the bonds were “insufficient in amount” was sufficient cause.

The appellant raised two points in the First Court. The first argued “the trial court illegally revoked [the appellant’s] bonds and raised the bond amounts without justifiable cause.” (Appellant’s Brief at 3). The second point argued some procedural matters that are not relevant at this point because the First Court did not address them. *See Gomez*, 2020 WL 4577148 at *1 (declining to reach second point because of resolution of first).

The relevant part of the appellant’s brief hinged on Code of Criminal Procedure Article 17.09. That article controls the trial court’s management of bail during a criminal trial. Section 2 states the general rule: “When a defendant has once given bail for his appearance in answer to a criminal charge, he shall not be required to give another bond in the course of the same action except as herein provided.” TEX. CODE CRIM. PROC. art. 17.09 § 2. Section 3, though, establishes several exceptions to this rule:

Provided that whenever, during the course of the action, the judge or magistrate in whose court such action is pend-

ing finds that the bond is defective, excessive or insufficient in amount, or that the sureties, if any, are not acceptable, or for any other good and sufficient cause, such judge or magistrate may, either in term-time or in vacation, order the accused to be rearrested and require the accused to give another bond in such amount as the judge or magistrate may deem proper. When such bond is so given and approved, the defendant shall be released from custody.

TEX. CODE CRIM. PROC. art. 17.09 § 3.

The appellant's argument was that there was no "good and sufficient cause," as that term has been defined in the case law, to require him to give another bond. (Appellant's Brief at 13-19). The appellant cited cases where appellate courts overturned trial court decisions under Article 17.09 because there was no "good and sufficient cause" for revoking bond. (Appellant's Brief at 15-16 (discussing *Meador v. State*, 780 S.W.2d 836 (Tex. App.—Houston [14th Dist.] 1989, no pet.) and *Ex parte King*, 613 S.W.2d 503 (Tex. Crim. App. 1981))).

The State responded that discussion of "good and sufficient cause" was irrelevant because Article 17.09 allows the trial court to revoke a defendant's bond if it "finds that the bond is ... insufficient in amount ... or for any *other* good and sufficient cause." (State's Brief at 11-15). The State pointed out that the plain text of the statute made the trial court's determination that the bond was insufficient in

amount a standalone basis for revocation that required nothing more. And by referring to “*other* good and sufficient cause[s],” the statute strongly implies that all the things listed before *are* good and sufficient causes. The State pointed out that its interpretation of the statute left the trial court with no more discretion in setting bail than the original hearing officer had—the remedy for excessive bail, whether set by the hearing officer or the trial court, is always through habeas.³

The State pointed out that the appellate reversals the appellant cited did not involve cases where, like this one, the trial court explicitly found the bond insufficient in amount. Finally, the State pointed out the importance of allowing trial courts to make bond determinations like the one here because often the prior bond determination was made by a magistrate who is no longer responsible for the case.

In a reply brief, the appellant claimed that by inserting the word “other” in the middle of the statute, the Legislature actually intended to apply the “good and sufficient cause” language to the causes listed earlier in the statute. (Appellant’s Reply Brief at 2-3). The appellant rearranged the statute, but even in that version it’s still obvious the tri-

³ The appellant’s application did not allege the overall amount of his bail was excessive. The application and appeal have been about whether the trial court could require a second bond after the appellant posted the first.

al court's determination that bond is insufficient is a standalone basis for revocation. (Appellant's Reply Brief at 3).

B. The First Court reversed on an argument not raised in the trial court or argued by the parties. The First Court held that when a defendant makes bail, the bond is necessarily sufficient in amount.

The First Court began its analysis by stating that the trial court made no finding regarding any of the circumstances for revocation in Article 17.09. *Gomez*, 202 WL 4577148 at *5-6. The First Court's analysis does not mention the trial court's determination that the amount of the bonds was insufficient.

In the next paragraph, the First Court treated whether the bonds were "insufficient in amount" as a question of arithmetic, not judgment: "[I]t is undisputed that the bonds were not 'insufficient in amount' to satisfy the amount of bail that was ordered...." *Id.* at *6

After disposing of the trial court's and State's plain-language argument in two cite-free paragraphs, the First Court spent much longer discussing cases about "other good and sufficient causes." *Id.* at *6-7. Neither the trial court nor the State had invoked any "other good and sufficient cause."

Ground for Review

The First Court erred by holding that a trial court cannot find a bond “insufficient in amount” once a defendant has posted the bond. Whether the bond is “insufficient in amount” is not a question of whether the defendant made a bond equal to the bail amount, it is a question of whether required the amount should be set higher.

The First Court’s holding is that when Article 17.09 allows the trial court to determine whether a bond is “insufficient in amount,” the only thing a trial court may look at is whether the defendant has posted a bond in the amount of the ordered bail. The State believes that is an incorrect interpretation: “Amount” refers to what the defendant has been ordered to pay, not what he has actually paid.

The State will first show that the First Court’s interpretation conflicts with the statutory definition of “bail bond.” Second, the First Court’s interpretation’s is bad statutory construction because it makes part of Article 17.09 meaningless. Third, when a statute allows a judge to determine whether bond is “insufficient in amount,” it is a question of prudence—“Is the bail high enough to meet the purposes of bail?”—not a question of mere arithmetic. Fourth, the history of Article 17.09 shows it was not intended to limit trial courts’ discretion to alter the amount of defendants’ bonds.

I. The definition of “bail bonds” shows that the “amount” of a bond is the amount set by a magistrate or court, not the amount the defendant actually pays.

The First Court recited the statutory definition of “bail bond,” though it is not clear how they applied it. *Gomez*, 2020 WL 4577148 at *4. That definition shows that the First Court misinterpreted what is meant by the “amount” of the bond.

A “bail bond” can be posted in two ways. First, the defendant can obtain sureties to vouch for his court appearance and the amount of bail. TEX. CODE CRIM. PROC. art. 17.02. Second, the defendant “may deposit with the custodian of funds of the court ... current money of the United States *in the amount of the bond* in lieu of having sureties signing the same.” *Ibid.* (emphasis added).

The First Court’s interpretation of Article 17.09 is that the “amount” of a bond is the amount the defendant has actually posted—thus its conclusion it was “undisputed” the bonds were sufficient because they matched the amount of bail. But if that were true, then any sum of money deposited with the court would be a bond, regardless of what a magistrate set bail at.

Article 17.02 shows that the “amount” of the bond determines what the defendant pays, not the other way around. Article 17.02 sup-

ports the State’s interpretation of Article 17.09: When a trial court is determining whether a bond is “excessive or insufficient in amount,” it is analyzing the amount the bond was set at, not the amount the defendant posted.

II. The First Court construed the phrase “insufficient in amount” in a way that renders parts of the statute meaningless.

Article 17.09 Section 3 is a list of situations where a trial court can require a defendant who has already bailed out of jail to give a second bond. In every Article 17.09 proceeding, the defendant will have already posted a bond that met the required amount. Yet the First Court interpreted Article 17.09 so that the only thing a trial court can consider in whether assessing whether a bond is “insufficient in amount” is whether it met the required amount. Under the First Court’s interpretation, the bond will *always* be sufficient in amount at an Article 17.09 proceeding.

Under the First Court’s interpretation, the only way a defendant’s bonds could be “insufficient in amount” is if the sheriff released a defendant who posted less bond than the trial court required. That seems like an uncommon occurrence, and the State has been unable to

find a case discussing the possibility. No cases citing to Article 17.09 involve such an event.

Article 17.09 also allows a trial court to order a defendant to obtain a new bond when it finds the bond is “excessive ... in amount.” The most natural reading of this—consistent with the State’s interpretation of the statute—is that it allows the trial court to reduce the required bond amount if it determines, after the defendant posted a bond, that the required amount was too high. This might occur in a cash bond situation.

Under the First Court’s interpretation of this statute—where “amount” refers to the amount the defendant actually posted, not the amount the trial court required—the bond would be “excessive in amount” only when a defendant posted more bond than the trial court required.⁴ That situation is unlikely, and easily solvable without a special statute: refund the overpaid sum.

If these improbable events occurred, both the underpayment and overpayment scenarios are covered elsewhere in Article 17.09: A trial court can require a defendant to give a new bond when it finds the

⁴ The First Court’s interpretation leaves trial courts without a mechanism to lower a bailed defendant’s bond amount. If, as the First Court held, bond cannot be “insufficient” so long as it matches the amount of the bail, neither could it be “excessive.”

current bond is “defective.” Both an underpaid and overpaid bond would fall into that category.

The First Court’s interpretation violates one of the cardinal rules of statutory construction, that every word and clause in a statute be given meaning. *See Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). By defining “insufficient in amount” so that it applies only to unlikely situations covered by another part of the statute, the First Court has left the phrase without effective meaning.

III. When bail statutes refer to judges or magistrates determining whether bail is “sufficient,” they refer to the amount at which bail is set, not the amount the defendant has paid.

When looking at whether the amount of bail is “sufficient,” an important question to ask is: Sufficient for what? *Cf. Lothrop v. State*, 372 S.W.3d 187, 190 (Tex. Crim. App. 2012)(“When discussing whether a particular action is ‘necessary,’ the relevant inquiry is always: Necessary to what end?”).

Article 17.15 lists factors for magistrates to consider when setting bail. That article requires that bail be “sufficiently high to give reasonable assurance that the undertaking will be complied with.” TEX.

CODE CRIM. PROC. art. 17.15. That article also says the future safety of the victim and the community “shall be considered.”

When other statutes require judges to assess whether bail is “insufficient in amount,” the logical reading is this is a reference to Article 17.15’s sufficiency requirement. That is: Article 17.09 allows a trial court to revoke a bond and require the defendant to get a new bond if it determines the current bond is insufficient in amount to give reasonable assurance that the defendant will show up to court, or to protect the victim and the community.

Two statutes allow judges of this Court, intermediate courts, district courts, and county courts to require defendants to obtain new bonds if, upon affidavit, it appears the current bail⁵ is “insufficient in amount.” Article 16.16 allows this procedure before indictment, and Article 23.11 allows it after indictment. TEX. CODE CRIM. PROC. arts. 16.16, 23.11.

⁵ Articles 16.16. and 23.11 ask whether “bail” is insufficient, but Article 17.09 asks whether “the bond” is insufficient. In this context, this is a distinction without a difference. “‘Bail’ is the security given by the accused that he will appear and answer before the proper court...” TEX. CODE CRIM. PROC. art. 17.01. Bail “includes a bail bond or a personal bond.” *Ibid.* No other type of bail is listed in the Code of Criminal Procedure. If the defendant’s bond is insufficient, that means his bail is insufficient; and his bail would be insufficient only if his bond were insufficient.

In AP-77,097, *State v. Singleton*, this Court recently used Article 16.16 to require a defendant to obtain a new bond because it appeared his then-current bond was insufficient in amount.⁶ There was no question Timothy Singleton had made his \$500 bond when this Court ordered him to obtain a new bond in the amount of \$100,000. So under the First Court’s interpretation of what it means for a bond to be “insufficient in amount,” this Court erred.

The State believes this Court in *Singleton* and the trial court here have the better understanding of what it means for bond to be “insufficient in amount.” It is not, as the First Court held, a question of whether the bond is sufficient to make the required bail—the law does not assign judges questions like, “Is a \$40,000 bail bond sufficient to cover a \$40,000 bail?” Instead, it is a question of whether the amount of the bond required in a case is sufficient to meet the purposes of bail. That is a prudential question that, within broad constitutional parameters, is given to the sound discretion of judges.

Here, the plain language of Article 17.09 allows the trial court to determine whether the appellant’s bond was “insufficient in amount.”

⁶ There were no opinions or substantial orders in this case. See <http://www.search.txcourts.gov/Case.aspx?cn=AP-77,097&coa=coscca>. This is obviously not binding precedent, but it is an example of how this Court interpreted the plain meaning of the phrase “insufficient in amount.”

The First Court erred in limiting the trial court's discretion to determining whether the appellant had bonded out of jail.

IV. Article 17.09 was not written to impede a trial court's ability to adjust defendants' bonds.

If Article 17.09 Section 2 establishes a general rule that defendant don't have to get a second bond, but Section 3 allows the trial court broad discretion to make defendants get a second bond, a reasonable question is: "What does Section 2 prohibit?" The history or Article 17.09 shows Section 2 was not meant to limit trial court discretion, it was meant to eliminate a century-long practice of requiring defendants to get subsequent bonds at various points in the proceedings.

For a hundred years, Texas defendants had to obtain additional bonds due to procedural, rather than substantive, developments in their cases. If a defendant made bail after being charged by complaint, upon indictment his bond would be discharged and he would need to get a new bond. *Ex parte Johnston*, 533 S.W.3d 349, 350-51 (Tex. Crim. App. 1976)(describing old procedure).⁷ If a case was transferred

⁷ *Johnston* discussed statutes going back to the 1895 Code of Criminal Procedure, but the statutes go back, at least, to the first Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. arts. 264, 267 (1856).

Johnston illustrates one pernicious effect of the old practice. If a defendant was charged by complaint and filed a habeas petition alleging his bail was too high,

from one county to another, the defendant had to obtain a new bond in the new court. TEX. CODE CRIM. PROC. art. 534 (1856).⁸ When a defendant was convicted, his bond was automatically discharged and he needed to enter into a new bond to obtain release pending appeal. TEX. CODE CRIM. PROC. arts. 582, 815 (1925).

That began changing in 1957 when the Legislature adopted Article 275a, which would become current Article 17.09. Act of April 5, 1957, 55th Leg. R.S., ch. 47, 1957 Tex. Gen. Laws 94, 94-95. Article 275a expanded the applicability of a bond so that it no longer applied just to a particular proceeding in a particular court, but also “for any and all subsequent proceedings had relative to the charge.” TEX. CODE CRIM. PROC. art. 275a § 1 (Vernon’s 1958 Supplement).⁹ To clarify that point, Section 2 made explicit that a defendant who once gave a bond need not obtain a second bond except in specific situations. *Id.* § 2. Section 3 listed situations in which the trial court could,

that petition—and any appeal from it—had to be dismissed when an indictment issued even if the defendant was still unable to make bail.

⁸ At one point this Court held that requirement was jurisdictional. If a bailed defendant did not obtain a new bond in the new venue any proceedings were void. See *Harris v. State*, 160 S.W. 447, 449 (Tex. Crim. App. 1913).

⁹ The 1958 supplement is available as a pdf from the State Law Library: <http://www.sll.texas.gov/library-resources/collections/historical-texas-statutes/>.

for substantive reasons, require a defendant to obtain a second bond. *Id.* § 3. Sections 2 and 3 are substantively the same as current Article 17.09.

After the revised Code of Criminal Procedure was adopted in 1965, soon-to-be-Judge Onion noted that Articles 17.09 and 44.04 worked together to make it possible for a defendant to post a single bond that would be good from when he was charged until his conviction became final. John F. Onion Jr., *Commentary on the Revised Code of Criminal Procedure*, 28 TEX. B.J. 727, 795, 810-11 (1965).¹⁰ It is apparent from the commentary this was a major change.

While the new statutes eliminated procedural requirements to keep obtaining additional bonds, Article 17.09 did not stop trial courts from ordering defendants to obtain additional bonds for substantive reasons: “Provisions have been retained to permit the judge in whose court the case or action is pending to require a new bond when to his discretion the same is required and to order the arrest of the defendant.” *Id.* at 795.

Not only is the State’s position consistent with the plain text of Article 17.09, it also reflects its history. Article 17.09 eliminated archa-

¹⁰ The State Bar provides bar members online access to the Bar Journal archives: https://www.texasbar.com/AM/Template.cfm?Section=Search_TBJ_Archives.

ic requirements to periodically get a new bond. It did not eliminate, or even reduce, the trial court's discretion in controlling the bail amount for defendants with pending cases.

Conclusion

The State asks this Court to reverse the First Court and reinstate the trial court's judgment. Alternatively, this Court should reverse the First Court and remand the case to that court to address the appellant's remaining point.

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